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No. 87-255

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

MAGD E. ZOHDI, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR SUN BELT FEDERAL BANK, F.S.B.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

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QUESTION PRESENTED

Whether claims against the assets of an insolvent, federally-insured savings and loan association must be presented in the first instance in federal receivership proceedings in accordance with the Federal Home Loan Bank Board's regulations for the administrative resolution of such claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 826 F.2d 1391. The judgment of the district court (Pet. App. A11-A22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1987. The petition for a writ of certiorari was filed on August 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 5(d)(6)(C) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(6)(C), provides:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver [appointed by the Fed-

eral Home Loan Bank Board], or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

Section 5(d)(11) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(11), provides:

> The Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, for the merger of associations with associations or with any institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, for associations in conservatorship and receivership, and for the conduct of conservatorships and receiverships; and the Board may, by regulation or otherwise, provide for the exercise of functions by members, directors, or officers of an association during conservatorship and receivership.

Section 406(d) of the National Housing Act, 12 U.S.C. 1729(d), provides:

> In connection with the liquidation of insured institutions, the [Federal Savings and Loan Insurance] Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

Pertinent regulations of the Federal Home Loan Bank Board provide in relevant part (12 C.F.R. 549.4):

> (a) When directed to do so by the [Bank] Board, the receiver shall promptly publish a notice to the association's creditors to present their claims, with proof thereof, to the receiver by a date specified in the notice * * *. Claims filed after the specified date shall be disallowed, except as the [Bank] Board may approve them for whole or part payment from the association's assets remaining undistributed at the time of approval. The receiver shall mail a similar notice to any creditor shown on the association's books at the creditor's last address appearing thereon.
>
> (b) The receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. * * * Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the disallowance, disallowance shall be final, except as the [Bank] Board may otherwise determine.

STATEMENT

This case arises from the decision by the Federal Home Loan Bank Board (Bank Board) to appoint the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for Sun Belt Federal Bank, F.S.B., a federally-chartered and federally-insured savings and loan institution. FSLIC appealed the district court's order requiring it to carry out the specific terms of a court-approved pre-receivership agreement between Sun Belt and several other entities. The court of appeals held that the district court lost jurisdiction over the case once FSLIC was appointed

receiver for Sun Belt and that petitioners' claims against the receivership had to be presented to FSLIC and the Bank Board for initial resolution. Petitioners seek review of the court of appeals' decision that creditors of failed savings and loan associations for which the Bank Board has appointed FSLIC as receiver are required by the Bank Board's statutes and regulations to exhaust the agency's mandatory administrative procedures for the initial resolution of creditor claims. Before turning to the specific facts of this case, we briefly describe the applicable statutory and regulatory framework.

1. *The Statutory and Regulatory Scheme.* The Bank Board is an independent agency in the Executive Branch of the United States organized pursuant to the Federal Home Loan Bank Act, 12 U.S.C. (& Supp. III) 1421 *et seq.* Congress has vested the Bank Board with broad discretionary powers over the operation of the savings and loan industry in order to maintain the financial stability of that industry and to protect the depositors of savings and loan institutions. 12 U.S.C. (& Supp. III) 1421-1449, 1461-1468. Pursuant to its statutory authority, the Bank Board "has promulgated regulations governing 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.' " *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 145 (1982) (citation omitted).

The Bank Board is also the operating head of FSLIC, a corporate governmental agency that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724 *et seq.*, for insuring the accounts of all federally-chartered savings and loan associations and most state-chartered savings and loan associations. 12 U.S.C. 1725(a), 1726, 1729(c); 12 C.F.R. 500.4. The Bank Board is empowered to appoint FSLIC as conservator or receiver for a federally-chartered savings and loan association, ex

parte and without prior court approval, upon a finding that one or more of five conditions specified in 12 U.S.C. (Supp. III) 1464(d)(6)(A) exists.

When the Bank Board appoints FSLIC as receiver of a failed institution, FSLIC is empowered by statute to liquidate the assets of the institution in an orderly manner. 12 U.S.C. 1729(b)(1)(A)(v) and (c)(1)(A). In its separate corporate capacity as insurer of depositors' accounts, FSLIC must pay insured depositors "as soon as possible" after an institution's default (12 U.S.C. 1728(b)), and FSLIC typically does so within days. When, as in the instant case, FSLIC cannot find an acquirer for the failed thrift, it must either pay out the insured deposits in cash or transfer the accounts to another institution along with sufficient cash or other consideration for assumption of the deposit liabilities. The consideration for this assumption of insured deposits comes from FSLIC's very limited insurance reserves; FSLIC, like any other creditor of the association, then must seek to recoup its insurance payments from the assets of the failed institution.

In its capacity as a federal liquidating receiver appointed by the Bank Board, FSLIC acts much like a bankruptcy trustee, marshalling the assets of the institution and paying "all valid credit obligations" to the extent of available assets and according to the priorities of the obligations. 12 U.S.C. 1729(b)(1)(B); 12 C.F.R. 549.4, 569a.7-569a.8. Thus, FSLIC's duties as receiver include responsibility for considering and accepting, compromising, or rejecting all claims against the assets of the association, "subject only to the regulation of the [Bank Board]." 12 U.S.C. 1729(d). To ensure the expeditious resolution in a single forum of all claims against a failed institution for which FSLIC has been appointed receiver, Congress further provided that "no court may * * *, except at the instance of the [Bank] Board, restrain or affect the exercise of powers or functions of a conservator or receiver." 12 U.S.C. 1464(d)(6)(C).

In accordance with these statutory provisions, and in furtherance of its power to "make rules and regulations * * * for the conduct of conservatorships and receiverships" (12 U.S.C. 1464(d)(11)), the Bank Board has promulgated regulations establishing an administrative claims procedure governing the presentation, allowance and payment, or disallowance of claims against the assets of a failed institution. 12 C.F.R. 549.4, 549.5, 549.5-1, 569a.7, 569a.8, 569a.9. The Bank Board's regulations, which have been in existence since 1956 (see 24 C.F.R. 149.4 (1956)), vest in FSLIC as receiver the exclusive authority to consider claims against a failed federally-chartered institution in the first instance. The regulations require the receiver to publish a notice to creditors, specifying a date by which claims must be filed, and to mail a similar notice to creditors shown on the books of the association. 12 C.F.R. 549.4(a). The regulations further provide that the "receiver shall allow any claim seasonably received and proved to its satisfaction." 12 C.F.R. 549.4(b). Claims allowed by the receiver are to be paid to the extent that funds are available. 12 C.F.R. 549.4(d).[1]

The receiver may also wholly or partly disallow any claim not proved to its satisfaction, but it must give the claimant notice of the disallowance and the reasons therefor. 12 C.F.R. 549.4(b). The claimant may ask the Bank Board to review the receiver's determination, and the Bank Board, acting pursuant to established procedures, may decide to allow a claim that the receiver has disallowed. 12 C.F.R. 549.4(b) and (c). If the Bank Board

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[1] After Congress amended the National Housing Act to give the Bank Board authority to appoint FSLIC as receiver for state-chartered institutions, the Bank Board promulgated similar regulations in 1968 to govern claims against the assets of failed state-chartered thrifts in federal receivership (see 12 C.F.R. Pt. 569a). See *North Mississippi Savings & Loans Ass'n* v. *Hudspeth*, 756 F.2d 1096, 1101 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986).

denies a claim, the claimant may seek judicial review of the Bank Board's decision. See *North Mississippi Savings & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096, 1103 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986).

2. *The Hudspeth and Morrison-Knudsen Decisions.* In *North Mississippi Savings & Loan Ass'n* v. *Hudspeth, supra,* the Fifth Circuit considered the application of the statutory and regulatory scheme described above to a counterclaim for specific performance and damages under a deferred compensation agreement brought by the ex-president of a savings and loan association that was later placed in a FSLIC receivership. The Fifth Circuit affirmed the district court's grant of FSLIC's motion to dismiss, holding that Hudspeth's claims were "switched to the administrative track" by virtue of 12 U.S.C. 1464(d)(6)(C) and 1729(d). *Hudspeth*, 756 F.2d at 1103.

After examining the language and legislative history of the Bank Board's statutes and regulations, the Fifth Circuit held that Hudspeth's breach of contract claim could not be presented in the district court in the first instance. Although the Fifth Circuit concluded that Hudspeth was free to challenge the receiver's disposition of his claim before the Bank Board and, if dissatisfied with the Bank Board's resolution, in district court under the Administrative Procedure Act, the court concluded that the statutory and regulatory scheme totally ousted the courts from making the initial determination of the validity of the claim (756 F.2d at 1102):

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: the FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a "restraint" within the scope of the statute.

The Fifth Circuit reaffirmed *Hudspeth* in its decision in this case and in *Chupik Corp.* v. *FSLIC*, 790 F.2d 1269 (1986). The Ninth Circuit, however, expressly rejected *Hudspeth* in *Morrison-Knudsen Co.* v. *CHG International, Inc.*, 811 F.2d 1209 (1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates*, No. 87-451 (filed Sept. 17, 1987). In *Morrison-Knudsen*, the court of appeals refused to require creditors to present their claims against failed thrifts for initial resolution in the federal receivership proceedings. Notwithstanding the court's express recognition of the validity of the Bank Board's regulations creating the administrative claims procedure (*Morrison-Knudsen*, 811 F.2d at 1217), the Ninth Circuit was of the view that neither the Bank Board's statutes nor its implementing regulations grant FSLIC as receiver the power to render "adjudicative" decisions. *Id.* at 1216-1219.

Based on this view of FSLIC's powers, the Ninth Circuit concluded in *Morrison-Knudsen* that creditors of a failed savings and loan association may assert claims against the assets of the institution in state or federal court without exhausting the administrative remedies contained in the Bank Board's regulations. 811 F.2d at 1222. The court did suggest that trial courts, in their discretion, may compel a creditor to present its claim to FSLIC as receiver before seeking judicial resolution of the claim. *Id.* at 1223-1224. However, a decision to require exhaustion would be based on an ad hoc balancing of competing interests, rather than on the Bank Board's mandatory exhaustion regulations. *Ibid.*

3. *The Facts of this Case.* In 1984, Sun Belt made two large loans secured by mortgages for real estate projects in Baton Rouge, Louisiana. Pet. App. A2. By July 1985, the borrowers had exhausted the loan funds without completing the real estate projects and had defaulted on their loan payments. *Ibid.* A spate of litigation and other legal maneuvering then ensued.

Numerous unpaid contractors, materialmen, and laborers recorded lien claims relating to each real estate project. Sun Belt and the borrowers filed suits against each other in state court, with Sun Belt seeking to foreclose its mortgages on the two properties and collect on the loans and the borrowers alleging breach of contract. Pet. App. A3. (One of the borrowers also filed for reorganization under the Bankruptcy Code. *Id.* at A3 n.1.)

In addition, on September 30, 1985, Sun Belt initiated the present action in the United States District Court for the Middle District of Louisiana against some of the borrowers, alleging diversion of loan funds from the two construction projects, breach of contract, and violations of federal law. Pet. App. A3. The various unpaid contractors, materialmen, and lienholders were not parties to this action.

In December 1985, the district court instituted settlement discussions extending beyond the parties and matters involved in the federal court action. Pet. App. A3. Thus, the district court convened and presided over conferences that included not only Sun Belt and the borrowers, but also the unpaid contractors, materialmen, and laborers, and the parties to the state court litigation and the bankruptcy proceedings. On December 23, 1985, the district court held a hearing and read into the record a settlement agreement intended to resolve all disputes arising out of the loan delinquencies. See Pet. App. A13-A22. The court of appeals summarized the agreement as follows (*id.* at A4):

> [T]he settlement provided that Sun Belt would receive title to the real estate projects and that the lienholders on the projects would release their claims for partial payments made by Sun Belt. In regard to Jefferson Lakes Apartments, the settlement provided that Sun Belt could complete it and that the building lienholders would perform the work on agreed upon terms. In regard to Essen Center, Sun Belt was obligated to complete the outer construction for $850,000.

Because of its precarious financial position, Sun Belt was at the time of the settlement discussions operating under a Consent Agreement with the Bank Board that required the Board's approval for any major undertaking. On December 23, 1985, Sun Belt sought and received consent from the institution's Supervisory Agent to enter into the settlement agreement. Thereafter, the district court issued a minute order approving the agreement, and, on January 6, 1986, the court entered an order dismissing Sun Belt's lawsuit.

Between December 23, 1985 and May 1, 1986, the parties accomplished several of the transactions provided for in the settlement agreement. Sun Belt received title to one of the real estate projects, and it made the requisite payment to the lienholders who then released their claims. Pet. App. A4. On May 1, 1986, Sun Belt signed a $5.5 million contract with the original contractors for the Jefferson Lakes Apartments project for completion of the project. *Id.* at A4-A5.

Also on May 1, however, the Bank Board determined that Sun Belt was insolvent. Pet. App. A5. Based on that determination, the Bank Board exercised its statutory authority (12 U.S.C. (Supp. III) 1464(d)(6)(A)) to appoint FSLIC as receiver for Sun Belt. On May 2, the receivership staff took possession of Sun Belt. On May 3, the receivership staff and the receiver's counsel, upon learning of the just-signed $5.5 million construction contract, immediately notified the contractor not to begin work. Pet. App. A5.

Later in May 1986, the district court held a status conference to determine whether the pre-receivership settlement agreement was being executed. FSLIC as receiver for Sun Belt advised the district court of its position that the creation of the receivership had divested the court of jurisdiction to enforce the agreement against FSLIC as receiver or to adjudicate claims arising from the agreement. Pet. App. A5. Several months later, other parties to the settlement (who had not formally intervened in the federal court action) moved for an order to show cause

why FSLIC as receiver should not be held in contempt for failing to fulfill all of Sun Belt's obligations under the agreement. *Ibid.*

On December 19, 1986, the district court issued an order denying FSLIC's motion to dismiss the case for lack of jurisdiction and compelling FSLIC to comply with the pre-receivership settlement agreement by, inter alia, completing the Jefferson Lakes project. Pet. App. A6. The district court stated that, if neeessary, it would enforce its ruling through criminal contempt proceedings. R.E. at D3.[2]

Subsequently, the district court offered three reasons for its ruling: (1) the persons and entities involved in the dispute, many of whom had had no direct contacts with Sun Belt, had changed their position in reliance on the pre-receivership settlement agreement; (2) the Supervisory Agent had acquiesced in the pre-receivership settlement and in the Jefferson Lakes construction contract; and (3) it would violate Article III of the Constitution to construe the Bank Board's appointment of FSLIC as receiver for Sun Belt as an event divesting the district court of subject matter jurisdiction. R.E. at D4 to D7, D11 to D15, D17 to D18, D24, D26 to D27.

The court of appeals granted a stay pending appeal of the district court's order requiring FSLIC's compliance with the pre-receivership agreement. Pet. App. A6 n.2. Thereafter, the court of appeals reversed, holding that the appointment of FSLIC as receiver for Sun Belt divested the district court of "subject matter jurisdiction over all claims against thrift receiverships until the administrative claims process involving those claims is completed." *Id.* at A7. The court of appeals elaborated on its reaffirmation

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[2] "R.E." denotes the Record Excerpts filed by FSLIC in the court of appeals.

of the *Hudspeth* doctrine (Pet. App. A8-A9 (footnote omitted)):

> To restate yet again, upon the appointment of a receiver, herein the FSLIC, all claims against the insolvent thrift, herein Sun Belt, are "switched to the administrative track," pursuant to 12 U.S.C. Sec. 1464(d)(6)(C), *Hudspeth*, 756 F.2d at 1103, and a federal court loses subject matter jurisdiction over the claims.
>
> The FSLIC has begun the administrative process on claims asserted against Sun Belt. That process is not yet complete and upon completion is subject to review by the Bank Board and ultimately a federal court.
> * * *
>
> *Hudspeth* is too clear—there are no end runs around the receiver's broad realm of authority. That realm of authority includes the initial administrative evaluation of claims asserted against it or the insolvent thrift.

The court of appeals therefore remanded the case to the district court with instructions to dismiss for lack of jurisdiction. Pet. App. A9. Petitioners ask this Court to review that decision.[3]

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[3] We note that petitioners are the contractors and others with whom Sun Belt had arranged for the $5.5 million construction contract for the Jefferson Lakes Apartments project. Although petitioners were not formal parties to this case, they were the entities that requested enforcement of the pre-receivership agreement by the district court. See pages 10-11, *supra*. Since that time, they have been treated as de facto parties by the district court and the court of appeals. We have therefore amended the caption of the case in this Court to reflect that they are the actual petitioners. The borrowers (George Bonfanti and related entities), although identified by the caption on the petition as the petitioners in this Court, in fact were not the real parties in interest in the courts below, nor have they sought review in this Court.

DISCUSSION

The Fifth Circuit's decision in this case reaffirms what we submit is a sensible, well established, and congressionally mandated Bank Board practice. Adhering to its previous decision in *Hudspeth,* the court holds that once the Bank Board appoints FSLIC as receiver for an insolvent thrift, all of the thrift's creditors must present their claims to FSLIC for initial determination and then, if the claim remains in dispute, exhaust the Bank Board's administrative remedies before seeking judicial relief. That decision, though correct, conflicts with the Ninth Circuit's decision in *Morrison-Knudsen,* which holds that a creditor is not required to present its claim for initial administrative resolution before invoking a court's jurisdiction. Under the Ninth Circuit rule, a trial court may require a claimant to exhaust the Bank Board's administrative remedies purely as a matter of discretion, to be decided in each case according to an ad hoc balancing of interests. See 811 F.2d at 1223-1224.

The conflict in the circuits presents a question of substantial practical importance for the orderly and efficient administration of all FSLIC receiverships. This petition presents the issue to the Court for the first time since the square conflict developed. We therefore submit that the Court should grant review limited to the question of exhaustion.[4]

1. The conflict in the circuits demands resolution by this Court.[5] FSLIC cannot sensibly administer federal

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[4] Since the filing of the instant petition, the government has filed petitions for a writ of certiorari in *Morrison-Knudsen* and a subsequent Ninth Circuit case following *Morrison-Knudsen. FSLIC* v. *Stevenson Associates,* No. 87-451 (filed Sept. 17, 1987); *FSLIC* v. *Murdock-SC Associates,* No. 87-452 (filed Sept. 17, 1987). We have asked the Court to hold those petitions for disposition as appropriate in light of the Court's disposition of the instant petition.

[5] In its decision in this case, the Fifth Circuit expressly declined to revisit *Hudspeth* in light of *Morrison-Knudsen.* Pet. App. A10 n.3. Moreover, the federal district courts have overwhelmingly endorsed

receiverships under a system that permits creditors in California to bypass the administrative procedure established to resolve their claims while requiring creditors in Texas to pursue statutorily-mandated exhaustion procedures before resorting to judicial review. A single failed institution for which the Bank Board appoints FSLIC as receiver may have creditors across the country.[6] Thus, the efficient administration of the approximately 60 FSLIC receiverships now in existence is threatened by the possibility that one or more creditors may file suit in a

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the Fifth Circuit's construction of FSLIC's governing statutes and regulations. See, *e.g.*, *Acquisition Corp. of America* v. *Sunrise Savings & Loan Ass'n*, 659 F. Supp. 138 (S.D. Fla. 1987); *FSLIC* v. *Oldenburg*, 658 F. Supp. 609 (D. Utah 1987); *FSLIC* v. *Hall Whispertree Associates*, 653 F. Supp. 148 (N.D. Tex. 1986); *First Financial Savings & Loan of El Dorado* v. *FSLIC*, 651 F. Supp. 1289 (E.D. Ark. 1987); *Kohlbeck* v. *Kis*, 651 F. Supp. 1233 (D. Mont. 1987); *FSLIC* v. *Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987); *Baer* v. *Abel*, 649 F. Supp. 25 (W.D. Wash. 1986); *Baer* v. *Abel*, 648 F. Supp. 69 (W.D. Wash. 1986); *Colony First Federal Savings & Loan Ass'n* v. *FSLIC*, 643 F. Supp. 410 (C.D. Cal. 1986); *Sunrise Savings & Loan Ass'n* v. *LIR Development Co.*, 641 F. Supp. 744 (S.D. Fla. 1986); *Politser* v. *Rosch*, No. 86-C-0776 (N.D. Ill. June 25, 1986); *Manning Savings & Loan Ass'n* v. *Federal Home Loan Bank Board*, No. 83-C-757 (N.D. Ill. Jan. 4, 1984); *First Savings & Loan Ass'n* v. *First Federal Savings & Loan Ass'n*, 531 F. Supp. 251 (D. Haw. 1981). See also *Lyons Savings & Loan Ass'n* v. *Westside Bancorporation, Inc.*, 636 F. Supp. 576 (N.D. Ill. 1986), aff'd, No. 86-1793 (7th Cir. June 5, 1987).

[6] In the case of the failed savings and loan institution that led to the litigation in *Morrison-Knudsen*, for example, claims of creditors have not been limited to judicial districts within the Ninth Circuit. See, *e.g.*, *Lyons Savings & Loan Ass'n* v. *Westside Bancorporation, Inc.*, 636 F. Supp. 576 (N.D. Ill. 1986) (following *Hudspeth*), aff'd, No. 86-1793 (7th Cir. June 5, 1987); *Ames Construction, Inc.* v. *Pinnacle Associates*, Civ. No. 85CV2543 (Adams County, Colo. Dist. Ct. Mar. 27, 1987) (following *Morrison-Knudsen*).

district court within the Ninth Circuit while others are compelled to present their claims to FSLIC as receiver. Under such a system, the claims of similarly situated creditors almost certainly would be resolved differently, resulting in arbitrary discrimination among claimants. Some courts, such as the district court below, may order specific performance of contracts (see page 11, *supra*), other courts may simply order that similar claims be allowed for pro rata distribution, and yet others would likely order exhaustion. Inequities are bound to result.

The current situation is particularly chaotic in California, because the Ninth Circuit's decision in *Morrison-Knudsen* also conflicts with the decision in *FSLIC* v. *Superior Court*, 180 Cal. App.3d 336, 225 Cal. Rptr. 422 (1986), cert. denied, No. 86-689 (Jan. 27, 1987). In that case, the California Court of Appeal expressly adopted the Fifth Circuit's reasoning in *Hudspeth*. 180 Cal. App.3d at 342, 225 Cal. Rptr. at 425. As a result, the California state courts are dismissing actions in favor of FSLIC's administrative proceedings, while the Ninth Circuit insists that those same proceedings may be maintained in California federal courts. Needless to say, the success of a plaintiff's lawsuit presenting a threshold question of federal law should not depend upon whether it is filed in state or federal court. Review by this court is therefore essential to enable FSLIC to administer a nationally uniform receivership program.

2. Review is also warranted because the Ninth Circuit's failure to require mandatory exhaustion of administrative remedies substantially interferes with the efficient and expeditious processing of claims against insolvent thrifts. By requiring claimants to present their claims for administrative resolution in the first instance, FSLIC is able to achieve a cost-effective and timely disposition of these receiverships' estates through an orderly liquidation. FSLIC's experience indicates that the vast majority of claims, both in terms of numbers and dollar totals, are

allowed, settled, or otherwise resolved administratively without need for review in the district courts. The consequences of bypassing this system would be severe: in the states within the Ninth Circuit alone, there are currently some 17 Bank Board-appointed FSLIC liquidating receiverships, involving 1,400 creditor claims aggregating $7 billion. In the states within the Fifth Circuit, the statistics are equally compelling—the 15 liquidating receiverships in those states involve more that 1,950 creditor claims totalling $2.2 billion. If the Ninth Circuit's ruling were followed in all these cases, the time necessary to resolve creditors' claims would increase dramatically, to the detriment of creditors and the public interest alike. It is difficult to imagine a more serious interference with the process of orderly liquidation.

Moreover, FSLIC as receiver generally cannot fix the time and manner of distribution of assets until it knows which claims are valid. If tribunals other than the receiver were permitted to determine the validity of claims in the first instance, enormous waste, confusion, and delay in the distribution of assets to all creditors would be the inevitable consequence.[7] In addition, if FSLIC were compelled to litigate every doubtful claim in the first instance,

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[7] *Hancock Financial Corp.* v. *FSLIC*, 492 F.2d 1325 (9th Cir. 1974), graphically illustrates the serious delays produced by initial judicial resolution of creditors' claims. In that case, the state superior court appointed FSLIC as receiver of a state-chartered association in 1966. *Id.* at 1326. By late 1971, FSLIC had sold "virtually all the receivership assets" when it received the state court's permission to sell the remaining assets. *Ibid.* Hancock then filed suit in federal court to enjoin FSLIC's sale of those assets. *Ibid.* Although the district court dismissed Hancock's complaint, it issued a temporary injunction to preserve the status quo pending appeal. *Ibid.* That injunction remained in effect for over two years before the Ninth Circuit affirmed the district court's dismissal and dissolved the injunction—eight years after the receivership was established. It was precisely this sort of delay that led Congress in 1968 to extend to FSLIC the same powers in

the legal expenses of the receiver would increase dramatically. Because these administrative expenses of the receiver enjoy first priority for payment, all creditors' recoveries would be reduced pro rata. See 12 C.F.R. 569a.7(a)(1). The result would be a serious threat to the integrity of the federal deposit insurance system and a decline in public confidence in the thrift industry—results that Congress surely wanted to avoid. See *FSLIC* v. *Superior Court,* 180 Cal. App.3d at 342, 225 Cal. Rptr. at 425.

The smooth functioning of the administrative claims process is also crucial to maintaining the integrity of the FSLIC insurance fund. As subrogee to insured depositors, FSLIC is almost always the major creditor of an insolvent thrift and is therefore directly injured by delay in the claims resolution process and by the excessive legal and administrative expenses involved in litigating every creditor's dispute. That injury is especially worrisome in light of the savings and loan industry's widely acknowledged financial difficulties. See *Morrison-Knudsen,* 811 F.2d at 1216; *Independent Bankers Ass'n of America* v. *Federal Home Loan Bank Board,* 557 F. Supp. 23, 25 (D.D.C. 1982).

The large number of insolvent thrifts requiring Bank Board intervention through the appointment of a receiver is unprecedented in the history of the federal deposit insurance system. As a consequence, FSLIC's insurance fund is under the most severe pressures it has ever faced. The General Accounting Office recently determined that the fund was insolvent by more than $3 billion and that efficient and economical liquidation of receivership assets is critical to restoring the fund. General Government Divi-

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receiverships of state-chartered institutions that it had previously enjoyed only in receiverships of federally-chartered institutions. See *Hudspeth,* 756 F.2d at 1101 n.2.

sion, U.S. General Accounting Office, *GAO/GGD-87-46BR, Thrift Industry: The Treasury/Federal Home Loan Bank Board Plan for FSLIC Recapitalization* 1, 3 (Mar. 1987). In a subsequent report, the Comptroller General advised the Bank Board that FSLIC's insurance fund was insolvent by more than $6 billion. Comptroller General, U.S. General Accounting Office, *GAO/AFMD-87-41, Financial Audit: Federal Savings and Loan Insurance Corporation's 1986 and 1985 Financial Statements* 6 (May 1987). Because of the extraordinary number of thrift institution insolvencies in recent years, FSLIC's reserves have been insufficient to permit it to close any but the weakest institutions. See Barth, Brumbaugh, Sauerhaft & Wang, *Insolvency and Risk-Taking in the Thrift Industry: Implications for the Future,* 3 Contemp. Policy Issues 4-6, 15 (Fall 1985). In these circumstances, allowing creditors to bypass the Bank Board's long-standing administrative claims process would have serious consequences for the public interest.

3. These adverse consequences need not be suffered, because the Fifth Circuit is correct in concluding that FSLIC's governing statutes and regulations require mandatory exhaustion of administrative remedies. In view of the compelling need for resolution of the conflict between the Fifth and Ninth Circuits, it is unnecessary to engage in an extended discussion of the merits of the case at this time. For present purposes, it is sufficient to reiterate that Congress has vested the Bank Board with broad discretionary authority over the creation, operation and liquidation of federal thrifts. This Court has already recognized Congress's sweeping authorization for the Bank Board's regulation of the "operation" of such associations in *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 161 (1982). The Bank Board's powers over the liquidation of federal savings and loan institutions derive from the same congressional enactment, Section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. III) 1464, and they should be given an equally broad reading.

Indeed, the Bank Board's power to regulate liquidation of failed thrifts must of necessity be broadly construed, because Congress has provided no other method for the liquidation of savings and loan associations.[8]

Thus, there can be little question that the Bank Board's mandatory administrative claims procedures were properly promulgated pursuant to its authority "to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations * * * which are insured by the [FSLIC]." 12 U.S.C. 1464(d)(11). The doctrine of exhaustion of administrative remedies provides " 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' " *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). That doctrine is fully applicable to the Bank Board's regulations requiring all claims against the assets of failed savings and loan associations in federal receiverships to be presented to FSLIC and the Bank Board for initial resolution. Here, as in *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975), "[t]he statutory scheme is thus one in which the [agency] may specify such requirements for exhaustion as [it] deems serve [its] own interests in effective and efficient administration." The Bank Board has done precisely that, and the courts must respect that determination. *Ibid.*[9]

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[8] Savings and loan associations are specifically excluded from the provisions of the Bankruptcy Code. See 11 U.S.C. 109(b)(2).

[9] Mandatory exhaustion of administrative remedies is supported not only by the Bank Board's statutorily authorized regulations, but by 12 U.S.C. 1729(d). That section expressly authorizes FSLIC as receiver to "settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the [Bank] Board." The power to "settle, compromise, or release claims" implies the power to require that those claims be presented in the first instance to the receiver.

Even if the Bank Board's statutes and regulations requiring mandatory exhaustion were less clear, exhaustion would nonetheless be required under well-settled principles of administrative law. This Court has repeatedly held that claimants must exhaust their administrative remedies before seeking relief in court when the question presented is one within the agency's specialization or expertise and when the administrative remedy is as likely as the judicial remedy to provide the desired result. See, *e.g.*, *McKart*, 395 U.S. at 193-194. Those criteria are plainly satisfied here. For the reasons stated above, it would seriously obstruct and delay the administrative process if both FSLIC and numerous courts across the country were simultaneously engaged in determining claims against a failed institution in federal receivership, and there can be no dispute that the administrative claims process is fully capable of granting complete relief. Accordingly, there is no reason to permit claimants to disregard this process or (as the Ninth Circuit held) to require ad hoc discretionary determinations whether to compel exhaustion to be made on a case-by-case basis.[10]

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[10] We note that the Bank Board's administrative claims process expressly includes provisions for expedited or emergency relief. See, *e.g.*, *Mason* v. *FSLIC*, No. 86-029 (FHLBB July 9, 1987) (Bank Board ordered FSLIC as receiver to abandon prior attempt to foreclose on petitioners' property because receiver had failed to prove compliance with state law procedural requirements for foreclosure); *Casey* v. *FSLIC*, No. 87-009 (FHLBB June 25, 1987) (Bank Board ordered FSLIC as receiver to release to petitioners entire amount in escrow established by failed thrift). Petitioners offer no excuse for their failure to invoke these emergency procedures in this case, and thus there is no merit to their argument (Pet. 15-16, 28) that exhaustion should not be required here because the physical assets at issue allegedly would deteriorate pending completion of the administrative process.

4. We submit that the Court should resolve the present conflict between the Fifth and Ninth Circuits, but further urge that the Court limit its grant of certiorari to the question as stated in this brief (see page I, *supra*). As we have explained, the fundamental threshold question that presently divides the Fifth and the Ninth Circuits is whether creditors of failed thrifts must present their claims in the federal receivership proceedings and exhaust their administrative remedies before pursuing judicial relief. Petitioners have framed the exhaustion question in a manner that is both overbroad and difficult to fathom. See Pet. i (Questions 1 and 2). For example, we do not fully understand what petitioners mean by asking the Court to decide whether FSLIC had "adjudicatory power to determine all claims against the FSLIC and the Federal Home Loan Bank Board in their individual capacities" (Pet. i (Question 1)). Those governmental entities have no "individual capacity."

Petitioners also suggest (but do not separately argue) a number of other issues in their list of questions presented. See Pet. i. Those issues, none of which has produced a conflict among the circuits, are either not ripe for resolution or not independently worthy of review. For example, petitioners ask the Court to decide the appropriate standard of judicial review of FSLIC and Bank Board administrative determinations. Pet. i (Question 3). That issue is premature at this juncture. Petitioners have filed administrative claims with FSLIC as receiver, and those claims are pending. At the conclusion of the administrative claims process, it is entirely possible that petitioners will be sufficiently satisfied with the outcome that there will be no need for judicial review, much less a need to decide the appropriate standard of review applicable in a judicial proceeding. Cf., *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-1020 (1984) (takings claim held not ripe prior to

completion of mandatory arbitration proceedings and exhaustion of Tucker Act remedy).[11]

Likewise, the petition should be denied insofar as it seeks review of the contention advanced below that the acquiescence of the Supervisory Agent in Sun Belt's consent to the pre-receivership agreement and execution of the Jefferson Lakes construction contract somehow "estops" FSLIC from exercising its statutory obligations as receiver for Sun Belt. See Pet. i (Question 4), 14-15. Whatever the merits of that argument,[12] it remains an essentially factual question as to which there is no conflict in the circuits and no unusual circumstance justifying review by this Court.

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[11] We note that the standard of review issue has never been squarely presented in any of the scores of lower court decisions requiring exhaustion of administrative remedies. In those cases, the courts have simply ruled on motions to dismiss actions brought by creditors of failed thrifts who failed to present their claims to FSLIC for initial resolution. Thus, statements in the opinions of some of the lower courts on this issue have been dicta. See, *e.g.*, *Morrison-Knudsen*, 811 F.2d at 1222; *Hudspeth*, 756 F.2d at 1103.

[12] Petitioners cite only a single state court decision in support of their argument (Pet. 14-15) and ignore the wealth of contrary authority dealing expressly with claims of estoppel against the federal government. See, *e.g.*, *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

CONCLUSION

The petition for a writ of certiorari should be granted limited to the question presented as stated in this brief.

Respectfully submitted.

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